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No. 85-724

In the Supreme Court of the United States

OCTOBER TERM, 1985

JOHN C. MANDANICI, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner is entitled to a new trial based on his claim of newly discovered evidence.

2. Whether the evidence at trial should be viewed in the light most favorable to petitioner for purposes of the new trial motion.

3. Whether the jury's verdict demonstrates that the jury was biased and irrational.

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OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. A2-A3) is reported at 770 F.2d 158 (Table). The order of the district court (Pet. App. A4-A12) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 7, 1985. A petition for rehearing was denied on August 29, 1985 (Pet. App. A1). The petition for a writ of certiorari was filed on October 26, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Following a jury trial in the United States District Court for the District of Connecticut, petitioner was convicted on three counts of making false statements to HUD,

in violation of 18 U.S.C. 1001.[1] He was sentenced to three five-year prison terms, which were suspended upon payment of fines totalling $20,000. The court of appeals affirmed convictions on two of the counts but reversed on the third. 729 F.2d 914 (1984). Petitioner's subsequent motion for a new trial was denied (Pet. App. A10), and the court of appeals affirmed without an opinion (Pet. App. A2-A3).

The evidence at trial is described in the court of appeals' opinion resolving petitioner's direct appeal (see Pet. App. A13-A27).[2] Petitioner owned an apartment building in Bridgeport, Connecticut for which he sought rental subsidy benefits through a program supervised by the United States Department of Housing and Urban Development (HUD) and directly administered by the Bridgeport Housing Authority (BHA). The program provides subsidies to landlords who (1) own a building needing major repair; (2) agree to complete rehabilitation work approved by BHA costing no less than $1000 per qualifying unit; and (3) execute certain HUD documents. The relevant documents contain express warnings against knowingly making false statements. Upon successful completion of the rehabilitation work, participants are entitled to a rental subsidy providing from 100% to 140% of the fair market rental of the rehabilitated apartment units. Pet. App. A15-A17.

In his application for rental subsidy benefits, petitioner briefly described the proposed rehabilitation and estimated its cost at $88,000. The application was approved by BHA, which informed petitioner that a minimum investment of $88,000 was required to qualify for federal subsidies. Subsequently, petitioner executed the required

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[1] The jury acquitted petitioner on one count of making a false statement to a bank, in violation of 18 U.S.C. 1014.

[2] Additional evidence was adduced at a hearing on petitioner's motion for a new trial and is described in the district court's order denying that motion (see Pet. App. A4-A12).

HUD contract and submitted it to BHA. Attached to this contract was an exhibit specifying each of the rehabilitation tasks petitioner agreed to undertake, together with their estimated costs, which totaled $88,000. The contract imposed on petitioner a schedule for the commencement and completion of the rehabilitation work. By submitting this contract and the attached exhibit, petitioner certified that he would complete the rehabilitation work in the prescribed manner. In a separate HUD document, petitioner subsequently certified that he had completed the agreed-upon rehabilitation or that he would do so in accordance with the terms contained in his contract with BHA. Upon execution of that agreement, petitioner was guaranteed a subsidy for 79 of the building's apartments, and soon thereafter he began receiving the subsidy payments. Pet. App. A18-A20.

Despite his certifications, however, petitioner neither completed the agreed-upon rehabilitation work nor performed certain of the tasks in the agreed manner. He furnished BHA with receipts from suppliers and subcontractors purportedly establishing that work had been completed. In truth, the work either had not been done, had been completed for a lower price than that shown, or had been performed on another building owned by petitioner (Pet. App. A20-A22). At trial, a jury concluded that petitioner knowingly made false statements concerning the performance of the rehabilitation. The court of appeals affirmed his conviction on two of the three counts. Pet. App. A24-A26.[3]

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[3] The court of appeals reversed petitioner's conviction on count one, which charged him with making a false statement in his initial application for HUD subsidies. The court concluded that petitioner was not required, in submitting his initial application, "to represent * * * that he would complete the proposed rehabilitation or that he would spend the estimated amount" (Pet. App. A24). Accordingly, it found no evidence in the record to suggest that any statement in that application was false (*ibid.*).

2. Petitioner's present challenge concerns the post-appeal discovery of a BHA document. Before petitioner was indicted, the grand jury subpoenaed BHA records relating to BHA's administration of the HUD housing rehabilitation program. These records were contained in approximately 25 file folders placed upright in a single cardboard box. Each folder contained documents concerning a particular rehabilitation project and each, including the folder relating to petitioner's building, was so marked. The rent calculation worksheet for petitioner's property, however, was missing from the file relating to his property. Thus, while both the government and petitioner's counsel extensively reviewed the files in the box, neither located the missing document prior to trial. Pet. App. A5-A6.

Following petitioner's trial and appeal, the box of files was returned to BHA. At that time, a member of the BHA staff discovered the missing worksheet, together with documents relating to other rehabilitation projects, beneath the upright folders. The worksheet indicates that petitioner received no more than 114.8% of the fair market rental for the apartments in his building, rather than a 120% subsidy. The worksheet also suggests that petitioner may have agreed to do only $79,550 of rehabilitation, rather than work totaling $88,000 (Pet. App. A6).

Petitioner filed a motion for a new trial based on the discovery of the worksheet. The district court denied the motion, ruling that the discovery of the worksheet provided no basis to disturb the conviction (Pet. App. A7). The court of appeals affirmed in an unreported judgment order (*id.* at A2-A3).

ARGUMENT

The court of appeals' decision is correct, is consistent with the opinions of this Court and other courts of

appeals, and does not raise questions of sufficient importance to merit this Court's review.

1. Petitioner contends (Pet. 14-21) that the rent calculation worksheet constitutes newly discovered, exculpatory evidence that entitles him to a new trial. He maintains that the worksheet is material evidence that was suppressed by the prosecution, citing this Court's decision in *United States* v. *Bagley*, No. 84-48 (July 2, 1985). That contention is meritless.

As a general matter, a motion for a new trial based on newly discovered evidence is controlled by Fed. R. Crim. P. 33. The motion typically will be denied unless the defendant can show that the evidence probably would have resulted in acquittal. See *United States* v. *Agurs*, 427 U.S. 97, 111 (1976). However, this Court has applied a different standard where the prosecutor fails to disclose evidence in his possession favorable to the accused. See *Brady* v. *Maryland*, 373 U.S. 83 (1963). This Court has ruled that a prosecutor's suppression of material evidence, requested by the accused and favorable to his case, violates due process (*id.* at 87). Thus, if suppressed evidence is exculpatory and material, a defendant is entitled to a new trial. *Ibid.* See *Moore* v. *Illinois*, 408 U.S. 786, 794-795 (1972). In the present case, the district court properly concluded (Pet. App. A7-A8) that the prosecution did not suppress the worksheet. Thus, the petitioner's request for a new trial is controlled by the general standard applied under Fed. R. Crim. P. 33. Petitioner failed to meet that standard (Pet. App. A8).

The district court specifically found, and petitioner does not dispute, that "government and defendant's counsel reviewed the files in the box * * * but the worksheet did not come to their attention" (Pet. App. A6). The government and petitioner had equal access to the worksheet and were equally ignorant of its existence. Under these circumstances, the government cannot be said to have sup-

pressed favorable evidence. See, *e.g.*, *United States* v. *Hutcher*, 622 F.2d 1083, 1088 (2d Cir.), cert. denied, 449 U.S. 875 (1980) (rejecting the notion that the prosecution must produce "materials that [it] never had in its files, never inspected, and never knew about"). See also, *e.g.*, *United States* v. *Brown*, 628 F.2d 471, 473 (5th Cir. 1980) ("[i]n no way can information known and available to the defendant be said to have been suppressed by the Government") (footnote omitted).

Even assuming that the government had "suppressed" the worksheet and that *Brady* governs this case, petitioner errs in suggesting that the worksheet is material to the determination of his guilt. This Court recently stated that such "evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States* v. *Bagley*, slip op. 14 (plurality opinion); slip op. 1 (White, J., concurring). As the district court correctly concluded (Pet. App. A8-A9), the worksheet was not material to petitioner's defense.

Petitioner offers the worksheet as evidence that he did not receive a full allowance under the rehabilitation contract, contending that it supports his claim that he had no criminal intent to deceive HUD and BHA (Pet. 18). According to petitioner, the worksheet shows that he was not criminally motivated in making false descriptions of his rehabilitation efforts because "in his mind he was only getting fair value and what he deserved" (*ibid.*). That defense is facially untenable; petitioner's subjective view of his just deserts does not excuse his intentional false statements. As the district court observed (Pet. App. A9), "[t]he simple fact of the matter is that the jury found that [petitioner] made false statements to HUD and BHA. The worksheet does not make the statements any less false."[4]

[4] The district court's conclusion is reinforced by petitioner's admission at trial that he believed that he was receiving the full subsidy to which he was entitled (see Tr. 1150).

Plainly, the worksheet is not material within the meaning of *Bagley*. Accordingly, petitioner is not entitled to a new trial on the basis of newly discovered evidence.

2. Petitioner argues that the courts below, in considering his motion for a new trial, should have reviewed the trial evidence in the light most favorable to him (Pet. 22-23). In support of his novel contention, petitioner recites a passage from *Strickland* v. *Washington,* No. 82-1554 (May 14, 1984), discussing the standard for determining prejudice in cases involving claims of ineffective assistance of counsel. *Strickland* provides that a new trial is warranted only if the defendant can demonstrate that there is a reasonable probability that, absent counsel's errors, the result of the proceeding would have been different. *Id.* at 24. *Strickland* notes that in assessing whether such a "reasonable probability" exists, a reviewing court "should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to law." *Ibid.*

Petitioner mistakenly interprets (Pet. 22) this passage to mean that, if a defendant challenges the sufficiency of the evidence on appeal, that evidence must be interpreted in the defendant's favor, despite the jury's verdict. Quite plainly, the passage simply recognizes that a reviewing court considering an ineffective counsel claim might also be faced with pending challenges to the sufficiency of the evidence and should give those claims separate consideration. It does not alter the well-established standards governing interpretation of jury verdicts. Notably, petitioner's post-appeal new trial motion cannot raise a timely challenge to the sufficiency of the evidence at trial—those challenges were resolved on direct appeal. Indeed, as *Strickland* itself notes, "[t]he high standard for newly discovered evidence claims presupposes that all the essential elements of a presumptively accurate and fair proceeding were present in the proceeding whose result is

challenged." Slip op. 23-24. Thus, petitioner's claim that the evidence should now be considered in the light most favorable to him is meritless.

3. Petitioner raises a third claim that has nothing whatever to do with his motion for a new trial based on newly discovered evidence. He contends (Pet. 23-25) that the jury that originally convicted him on the three false statement counts was biased and irrational. Because petitioner failed to raise this claim on direct appeal of his conviction, he is precluded from raising it here. See, *e.g.*, *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977). In any event, the claim is meritless.

Petitioner claims that the jury must have been biased and irrational because the court of appeals reversed the jury's factual findings on one of the three counts that resulted in conviction. According to petitioner, the jury's error can be ascribed only to pervasive irrationality and prejudice that infected the whole trial (Pet. App. A23-A24). However, the court of appeals expressly upheld the jury's conclusions on the other two counts (Pet. App. A24-A25), and there is no evidence that the jury harbored any bias against petitioner. Indeed, his claim of bias is directly contradicted by the fact that the jury acquitted him on one of the four counts charged in the indictment.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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